88-403

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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE AMERICAN BOARD OF ENDODONTICS and THE AMERICAN ASSOCIATION OF ENDODONTISTS,

Petitioners,

vs.

JOAN ELENA LANIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BARRY LEVENSTAM *
WILLIAM D. SNAPP
MARK A. DUPONT
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Petitioners

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Does the Due Process Clause protect professional not-for-profit corporations from being subjected to the jurisdiction of a state for claims arising from acts taken outside that state, where the professional corporations' only contacts with that state are that members live there and/or that they have received a membership application from a resident of that state?

RULE 28.1 LISTING

Petitioner, the American Board of Endodontics has no parent company, affiliate, or subsidiary. Petitioner, the American Association of Endodontists has no parent company, affiliate, or subsidiary.

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In The

Supreme Court of the United States

October Term, 1988

THE AMERICAN BOARD OF ENDODONTICS and THE AMERICAN ASSOCIATION OF ENDODONTISTS,

Petitioners,

vs.

JOAN ELENA LANIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The American Board of Endodontics and The American Association of Endodontists respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-33a) is reported at 843 F.2d 901. The order of the court of appeals denying rehearing (App. B, *infra*, 34a) is not reported. The memorandum opinion and order of the district court (App. C, *infra*, 35a-49a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1988, and a timely petition for rehearing was denied on June 14, 1988. (App. B, *infra*, 34a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution are set forth in Appendix D, *infra* (50a).

STATEMENT OF THE CASE

1. Introduction

Petitioner, the American Board of Endodontics ("the Board"), is an Illinois not-for-profit corporation dedicated to the advancement of endodontics—the dental specialty of treating tooth pulp diseases—by elevating the standards of endodontic practice through the certification of candidates practicing this specialty. (Policy and Procedures of the Board at 1, R. 107; Bylaws of the Association at Chapter VIII, Section 1, R. 103.) Endodontists who successfully complete a series of rigorous examinations are certified as "diplomates" of the Board. (Harrison Affidavit at ¶ 2, R. 49-50.)

Petitioner, the American Association of Endodontists ("the Association"), is a separate Illinois not-for-profit corporation whose goal is to promote and improve endodontic treatment. The Association sponsors the Board, but exercises no control over the examinations that the Board administers or the Board's decisions to grant or deny diplomate status. (Kudo Affidavit ¶¶ 3, 5, 8, R. 57-58.)

2. Respondent's application for diplomate status

Respondent Joan Elena Lanier is licensed to practice dentistry in Michigan and specializes in endodontics. In 1981, respondent contacted the Board at its headquarters in Chicago, Illinois and requested that the Board send her an application for diplomate status. The Board mailed respondent the materials she requested. Respondent subsequently completed the application and returned it with the required fee to the Board in Chicago.

The Board requires each applicant to successfully complete three steps in order to obtain diplomate status: a written examination, submission of a portfolio of twenty case studies, and an oral examination. Respondent travelled to Chicago to sit for the Board's written examination, which she passed. (Lanier Aff. ¶¶ 9, 10, R. 123; 9/24/84 Compl. ¶ 4, R. 25.) She then submitted a portfolio of case histories to the Board in Chicago, which the Board approved in April, 1982. (Lanier Aff. 12, 13, R. 123; 9/24/84 Compl. ¶ 5, R. 26.) That same month, respondent travelled to Phoenix, Arizona, where she took the oral examination. (Harrison Affidavit ¶ 3A, R. 50.) Respondent failed this examination. (*Id.*) She travelled to Chicago to take the oral examination again in October, 1982, but failed once again. (*Id.*)

Respondent subsequently filed this suit in Michigan, alleging that the Board and the Association committed sex

discrimination in administering the oral examinations of April (in Phoenix) and October (in Chicago), 1982, in violation of Michigan's Elliot-Larsen Civil Rights Act.

3. Contacts of the Board and the Association with Michigan

As the record below reflects, neither the Board nor the Association conducted any business in Michigan when this suit was filed. Neither petitioner was incorporated in, or licensed to transact business in, Michigan. Neither had any office, agent, or employee in Michigan, owned property there, maintained a bank account there, or maintained a telephone or telephone listing there. Neither organization had held a meeting in Michigan in over twenty years. No director of either organization maintained a residence or principal place of business in Michigan. The Board had not purchased or circulated any advertisement or paid announcement in Michigan. The Association did not print or publish either of its two publications in Michigan. (District Court Op., App. C, *infra*, at 40a-42a; Harrison Aff. ¶¶ 4-15, R. 50-53; Catrambone Aff. ¶ 7, R. 55; Kudo Aff. ¶¶ 13-18, 23-31, R. 59-64.)

The sole contacts that either petitioner had with Michigan were the incidental result of having members who reside in Michigan; thus, Michigan members pay their dues from Michigan, and petitioners send their publications and notices to their members in Michigan. (*Id.*)

Seventy-eight of the Association's then approximately 2600 members lived in Michigan; 14 of these were diplomates of the Board. (Roster of American Board of Endodontics, R. 150-151.) In addition to Michigan, members of the Association and the Board resided in every state in the union and in Canada, Mexico, South America, Africa, Australia, Europe, and Asia. (*Id.*, R. 131-175.)

4. Proceedings below

The district court held that it lacked personal jurisdiction over petitioners, and dismissed respondent's complaint.[1]

The court of appeals held, in a 2 to 1 decision that produced three separate opinions, that the district court could constitutionally exercise limited personal jurisdiction over petitioners pursuant to Michigan's long-arm statute.

After concluding that this case involved "[t]he transaction of any business within the state" under Mich. Comp. Laws § 600.715(1), Circuit Judge Ryan turned to the due process question.[2] Judge Ryan deemed it "irrelevant" that petitioners had not solicited respondent's application for diplomate status. App. A, *infra*, at 16a. In Judge Ryan's view the Board transacted business in Michigan by entering into a "contract" with respondent in which the Board would confer certification upon respondent in return for respondent's satisfaction of the eligibility requirements. App. A, *infra*, at 7a, 17a. He concluded that it was constitutionally reasonable to exercise jurisdiction over the Board and the Association, because the Board is a national organization that "depends" upon having members in each state and because both the Board and the Association had "purposely availed themselves of the opportunity to gain members and certify members in the state of Michigan." App. A, *infra*, at 18a.

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[1] Respondent initially filed suit against the Board in Michigan state court. After this suit was removed to federal district court based upon diversity of citizenship, respondent filed a second suit against both the Board and the Association in federal court "by mistake." *See* App. A, *infra*, at 4a. The suits were subsequently consolidated, and both were dismissed by the district court.

[2] Petitioners do not seek to have this Court construe the state statute involved.

Concurring separately, District Judge Hull (sitting by designation) eschewed Judge Ryan's focus on the Board's "contract" with respondent, and focused instead upon what he deemed other contacts with the state of Michigan. App. A, *infra*, at 19a-23a. Judge Hull found that the Board had a "direct impact on the commerce of Michigan and [had] purposely availed itself of the privilege of transacting business there" because the Board previously had certified endodontists who practice in Michigan, and had ongoing relationships with those individuals. App. A, *infra*, at 19a-20a. Judge Hull concluded that the Board's contacts with respondent arose from its business activities in Michigan, and therefore, that jurisdiction over the Board and the Association in Michigan was proper. App. A, *infra*, at 21a-22a.

Circuit Judge Krupansky dissented from the holding that jurisdiction could be exercised over the Board and the Association within the limits of due process. At the outset, he reasoned that the Board's contacts with Michigan would not be sufficient to constitute the transaction of business within Michigan unless they had a realistic impact upon Michigan commerce. App. A, *infra*, at 26a. In his view, the Board had not transacted business in Michigan merely by furnishing an application upon request, accepting a processing fee, and communicating with respondent concerning the status of her application. App. A, *infra*, at 26a-27a. Judge Krupansky likewise found the Board's general goals insufficient to confer jurisdiction over the Board in Michigan, since the Board evidenced no particular intent with respect to Michigan or any other specific state. App. A, *infra*, at 29a. Judge Krupansky further concluded that respondent's charge of sex discrimination did not arise from the Board's contacts with Michigan, because that charge did not relate to the Board's communications with respondent in Michigan. App. A, *infra*, at 29a-30a. Finally, Judge Krupansky found that the Board

did not have a substantial connection with Michigan by way of a "generalized desire to serve the national market," an awareness that its actions might affect many states, or by benefitting indirectly from transactions in Michigan, and concluded therefore that jurisdiction over the Board was inconsistent with the constitutional " 'notions of fair play and substantial justice.' " App. A, *infra*, at 31a-32a.

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH THE DUE PROCESS PRINCIPLES SET FORTH IN THE DECISIONS OF THIS COURT AND WITH THE RESULTS REACHED BY THE OTHER CIRCUITS ON SIMILAR FACTS.

This case presents an important question pertaining to the due process limits upon personal jurisdiction that this Court has not yet answered: whether a nationwide not-for-profit professional corporation can be haled into court in any state in which it has a member, or in any state into which it has sent a membership application upon request, for a claim based on actions it has taken outside that state. By answering this question in the affirmative below, the court of appeals came into direct conflict with the due process guidelines set down by this Court and with the decisions of the other courts of appeals.

A. Conflicts With The Decisions Of This Court.

As this Court has held, the boundaries that the Due Process Clause places upon *in personam* jurisdiction are intended to serve as guideposts to parties who must plan

their activities with an eye to where they might be haled into court.

> By requiring that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,' *the Due Process Clause 'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'*

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (citations omitted) (emphasis supplied).

In this case, the Board's contacts with applicants were structured so that it should not reasonably have expected that it could be haled into court in every state and territory of the United States or in any of several foreign countries. The Board requires each applicant, like respondent, to complete each significant step in the application process at a location specified by the Board: respondent mailed her application and processing fee to the Board in Chicago; she took the written examination in Chicago; and she forwarded her portfolio of case studies to Chicago for review there. Most important, respondent took the oral examinations, which she alleges to be discriminatory, in Chicago and Phoenix, not in Michigan. Nevertheless, the court of appeals concluded that it was constitutionally acceptable to summon petitioners to Michigan to defend respondent's suit.

The decision below thus virtually eliminates the ability of any professional not-for-profit corporation with members or potential members in many states to control where it can be haled into court—an ability that this Court has said due process should provide them. *Burger King*, 471 U.S. at 472; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The decision below also ignores several factors that this Court has deemed important to deciding whether the exercise of personal jurisdiction comports with due process:

1. Petitioners are not-for-profit professional corporations.

The court of appeals dismissed as unimportant the fact that the Board and the Association are not-for-profit organizations. App. A, *infra*, at 15a, n.2. Although this Court has not yet addressed the activities of not-for-profit associations, it has often given emphasis to the *commercial* nature of a defendant's activity as the basis for asserting jurisdiction. *See Burger King*, 471 U.S. at 476; *Kulko v. Superior Court of California*, 436 U.S. at 97, 100 (1978); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). The lack of a profit to either the Board or the Association from its limited contacts with Michigan is an important factor demonstrating that it is inconsistent with the concepts of fair play and substantial justice to subject the Board and the Association to personal jurisdiction in Michigan.

2. Respondent initiated her "business transaction" with the Board.

The court of appeals deemed it irrelevant that respondent, and not the Board, initiated the application process. App. A, *infra*, at 16a. This conflicts directly with the Court's holding in *Hanson v. Denckla*, 357 U.S. 235 (1958), that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state." *Id.* at 253. *See also Burger King*, 471 U.S. at 475 & n.17; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984).

3. Respondent's "contract" with the Board was attenuated.

The decision below conflicts with this Court's holding that a contract alone becomes sufficient to confer jurisdiction over a non-resident defendant *only* when it "creates continuing relationships and obligations with citizens of another state." *Burger King*, 471 U.S. at 473, *quoting Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950). Respondent's application to the Board for diplomate status created no such continuing obligations or relationships; upon respondent's failure to pass the oral examination, her "business transaction" with the Board was terminated.

B. Conflicts With The Decisions Of Other Courts Of Appeals.

The decision below also conflicts directly with *Burstein v. State Bar of California*, 693 F.2d 511 (5th Cir. 1982). In *Burstein*, the court of appeals held that contacts virtually identical to those the petitioners in this case had with Michigan were insufficient to support the assertion of jurisdiction by Louisiana over a professional association, the State Bar of California.

Burstein, a Louisiana resident, took and failed the California bar examination, and then filed suit in Louisiana against the California Bar. The Bar's contacts with Louisiana included the following: Burstein requested and mailed her application from Louisiana; the Bar mailed Burstein's application and later her test score to her in Louisiana; over 50 members of the California Bar lived in Louisiana, received mailings from the Bar in Louisiana, and submitted their membership fees from there; and almost 90 students attending law school in Louisiana applied to take the California bar exam around the time that Burstein had.

The *Burstein* court held these contacts insufficient to meet the demands of due process and confer jurisdiction over the California Bar, rejecting both the "contract" rationale that Judge Ryan adopted below and the analysis of general contacts with the state upon which Judge Hull relied below. 693 F.2d at 518-23. The *Burstein* court noted that the California Bar did not solicit members from Louisiana, and reasoned that the mere fact that it permitted Louisianans to apply for and maintain membership was not the equivalent of commercial activity from which it would receive a significant benefit. *Id.* at 522.

The decision below also conflicts with the holdings of other courts of appeals addressing similar contacts between the defendant and the forum:

1. Phone calls and letters to respondent in Michigan.

Judge Ryan's opinion rejected as "clearly mistaken" the Board's argument that its few phone calls and letters to respondent in Michigan did not constitute purposeful availment of the benefits of doing business in Michigan. App. A, *infra*, at 10a. This conflicts with *Borntrager v. Stevas*, 772 F.2d 419, 421 (8th Cir.), *cert. denied*, 474 U.S. 1008 (1985), in which the court of appeals held that Missouri did not acquire jurisdiction over the Clerk of the United States Supreme Court by virtue of the Clerk's phone call and letter to the plaintiff in Missouri in response to his application to the Supreme Court Bar. *See generally Rambo v. American Southern Ins. Co.*, 839 F.2d 1415, 1418-20 (10th Cir. 1988) (phone calls and letters to plaintiffs in forum not purposeful contacts, where they were the fortuitous result of plaintiffs' residence there and not defendants' solicitation of any business in forum); *Nicholas v. Buchanan*, 806 F.2d 305, 307 (1st Cir. 1986) (alleged oral contract with, and telephone calls and letters to plaintiff

in forum insufficient to confer personal jurisdiction over defendant in forum); *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (use of mails or telephone ordinarily do not constitute purposeful activity with respect to forum state); *Smith v. Piper Aircraft Corp.*, 425 F.2d 823, 825 (5th Cir. 1970) (non-resident defendant's letter responding to plaintiff's unsolicited letter did not constitute transaction of business in forum state).

2. Place where "contract" substantially performed.

Judge Ryan's analysis also conflicts with the decisions of other circuits concerning contracts between the plaintiff and nonresident defendant. In *Burstein*, for example, the court of appeals noted that the alleged misgrading of the bar examination occurred, if at all, in California rather than Louisiana, so that the breach and any witnesses to it would be located outside the proposed forum state. 693 F.2d at 518-19, 522. The same is true here: The examinations were administered in Illinois and Arizona; consequently, the alleged acts of discrimination and witnesses thereto are found outside of Michigan.

Other courts of appeals also have rejected the residence of the plaintiff in the forum as sufficient to confer jurisdiction in the forum, and have instead looked to the place of performance as determinative. *See Austad Co. v. Pennie & Edmonds*, 823 F.2d 223, 226-27 (8th Cir. 1987) (law firm's representation of forum resident did not justify exercise of personal jurisdiction over law firm in forum, since law firm did not solicit the representation and the litigation that the law firm was hired to handle arose and occurred outside forum); *Johnston v. Frank E. Basil, Inc.*, 802 F.2d 418, 420-21 (11th Cir. 1986) (defendants' recruitment of employees in forum insufficient to confer jurisdic-

tion in forum where material performance occurred elsewhere); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1892 (1987) (contract with forum resident and communications directed to plaintiff in forum not enough to support jurisdiction in forum, where performance of contract was centered elsewhere and contacts with forum merely the fortuitous result of plaintiff's residence there).

3. Presence of Board and Association members in Michigan.

Finally, Judge Hull's opinion conflicted with the decisions of other courts by concluding that the Board and the Association "transacted business" in Michigan by virtue of having members there. App. A, *infra*, at 19a-21a. Other lower courts have disavowed routine interaction between a defendant organization and its members in a forum state as a basis for asserting jurisdiction over the defendant. *E.g., Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020 (8th Cir. 1988) (presence of members of professional association who reside in Iowa and receive association's mailings in Iowa insufficient to confer jurisdiction in Iowa); *Burstein v. State Bar of California, supra*, 693 F.2d at 522 (presence of members of California bar who reside in Louisiana, receive communications in Louisiana and send dues from Louisiana insufficient to confer jurisdiction in Louisiana); *Oklahoma Publishing Co. v. National Sportsmen's Club, Inc.*, 323 F. Supp. 929, 930 (W.D. Okla. 1971) (club was not "doing business" in Oklahoma by mailing its magazine to members residing in Oklahoma).

Similarly, in interpreting the jurisdictional provisions of the Clayton Act, 15 U.S.C. § 22, the lower courts have held that professional associations do not "transact busi-

ness" in a judicial district merely because their members reside in the district and receive the association's publications there. *Bartholomew v. Virginia Chiropractors Ass'n*, 612 F.2d 812, 816 (4th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980); *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 437-38 (5th Cir. 1977); *Academy of Ambulatory Foot Surgery v. American Podiatry Ass'n*, 516 F. Supp. 378, 380-81 (S.D.N.Y. 1981); *Health Care Equalization Committee v. Iowa Medical Society*, 501 F. Supp. 970, 980-81 (S.D. Iowa 1980), *aff'd*, 851 F.2d 1020 (8th Cir. 1988).

The decision below has planted seeds of confusion in the case law dealing with the due process boundaries of personal jurisdiction over professional not-for-profit corporations that have very limited contacts with a plaintiff's chosen forum state. The need for uniformity among the circuits, and the need for reliable guideposts that professional not-for-profit corporations can use to protect themselves from jurisdiction in every state in the union, justify the issuance of a Writ of Certiorari to the court of appeals in this case.

CONCLUSION

For the reasons set forth above, petitioners, the American Board of Endodontics and the American Association of Endodontists, respectfully request this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered in this cause.

Respectfully submitted,

BARRY LEVENSTAM *
WILLIAM D. SNAPP
MARK A. DUPONT
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Petitioners

* Counsel of Record

Dated: September 6, 1988

APPENDICES

APPENDIX A

No. 85-1645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOAN ELENA LANIER,

Plaintiff-Appellant,

v.

THE AMERICAN BOARD OF ENDODONTICS and THE AMERICAN ASSOCIATION OF ENDODONTISTS, a corporation,

Defendant-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and filed March 31, 1988

Before: KRUPANSKY and RYAN, Circuit Judges; and HULL,* District Judge.

RYAN, Circuit Judge, delivered the opinion of the court. HULL, District Judge, [pp. 19a-23a] delivered a separate concurring opinion. KRUPANSKY, Circuit Judge, [pp. 23a-33a] delivered a separate opinion, concurring in part and dissenting in part.

* The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

RYAN, Circuit Judge. This case concerns the application of the Michigan long-arm statute, Mich. Comp. Laws § 600.711 *et seq.*, to a transaction involving a Michigan dentist who sought and was denied certification by the American Board of Endodontics (Board), an Illinois corporation.

The dispositive question is whether, on the facts presented, the federal district court sitting in Michigan acquired limited personal jurisdiction over the defendant Board and its principal, the American Association of Endodontists (Association). The district court held it did not. We disagree, and reverse.

Plaintiff, Doctor Lanier, is licensed to practice dentistry in Michigan and specializes in endodontics, a dental specialty concerned with diseases of tooth pulp. She sought certification by the defendant Board by requesting that the Board send an application to her from its headquarters in Chicago, Illinois. Certification is a three-step process: a written examination, submission of a portfolio of case studies, and finally, an oral examination. Dr. Lanier completed the application and sent it to Chicago with the required fee. She later traveled to Chicago where she successfully passed the written portion of the examination. Her portfolio of case studies was sent to the defendants' Chicago headquarters and was approved. Dr. Lanier then went to Phoenix, Arizona where the oral examination was given. She failed the examination and was notified of that fact by mail.

After paying another application fee, Dr. Lanier went to Chicago where she again took the oral examination and failed.

Dr. Lanier then filed suit against the defendants in the state court in Michigan, alleging that her rejection by the Board was a result of sex discrimination, in violation of the Michigan Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.210 *et seq.* The defendants removed the case to the federal district court. Plaintiff challenged the removal petition as untimely and sought remand to the state

court because of the diversity of citizenship of the parties. The plaintiff's challenge to the timeliness of the removal petition presents the first issue we are required to address.

I.

28 U.S.C. § 1446(b)(1973) provides:

> The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

Dr. Lanier's complaint, filed in the Michigan state court, was received by the Association in Chicago on September 27, 1984, but valid personal service of process was not completed until October 5. The Association filed its removal petition on November 2, 1984, which is more than "thirty days after the receipt by the defendant, through service *or otherwise*, a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . ." (emphasis added). The district court concluded, correctly we think, that defendants' removal petition was untimely. The court held, however, that Dr. Lanier had waived her right to challenge the untimeliness of the removal petition because she acted affirmatively to submit herself to the jurisdiction of the federal court. The court's waiver ruling derived from the following facts:

On November 15, a day less than two weeks after the defendants' removal petition was filed, counsel for the parties entered into an agreement by which the defendant Board would be permitted an extension of time in which to file a motion to dismiss and a memorandum in support thereof, and would supply answers to certain inter-

rogatories submitted by the plaintiff concerning the question of personal jurisdiction.

On November 20, plaintiff's counsel filed with the district court a "notice to produce," demanding that defendants produce certain named documents, and a set of forty-two interrogatories directed to the defendant. Plaintiff's counsel attached a letter to the defendants' copy of the interrogatories which stated:

> In researching the case on personal jurisdiction, . . . I discovered that your removal petition was filed untimely . . . I am in the process of preparing our motion to remand which should be filed in the next day or two.

On November 27, plaintiff filed a second lawsuit against the defendants, this time in the United States District Court, alleging essentially the same cause of action as was pleaded in the first case. However, in a letter dated November 30, plaintiff's counsel advised defendants' counsel that the second lawsuit was filed "by mistake" and was intended to be an amendment to the original cause of action. Subsequently, on the defendants' motion, uncontested by plaintiff, the cases were consolidated. On the same day, November 30, plaintiff filed her motion to remand the case to the state court. Plaintiff contends on appeal that the district court erred in holding that she had waived her right to challenge the defendants' removal petition as untimely.

It is settled that when a party undertakes affirmative action in the federal district court, she has acquiesced in the federal court's jurisdiction and waived objection to the removal. *See In re Moore*, 209 U.S. 490 (1908); *Harris v. Edward Hyman Co.*, 7664 F.2d 943 (5th. Cir. 1981). Dr. Lanier agrees that the district court has discretion to determine whether she has waived any right to object to removal. She contends however, that she did not unduly delay her motion for remand, pointing out that she moved for remand a mere eleven days after having taken any affirmative action in the federal court. She argues that

the activity she undertook in the federal court was defensive until after such time as she advised defendants that she intended to move to remand.

It is likewise settled that the district court has broad discretion in deciding whether a plaintiff has waived a right to object to procedural irregularities in removal proceedings. *See, Charles D. Bonnanno Linen Service, Inc. v. McCarthy,* 708 F.2d 1, 6 (1st Cir. 1983), *cert. denied,* 464 U.S. 936 (1983); *Godman v. Sears, Roebuck & Co.,* 588 F.Supp. 121, 124 n.3 (E.D. Mich. 1984).

Here, before filing her motion to remand to the state court, plaintiff entered into stipulations, filed requests for discovery, sought to amend her complaint, filed a new lawsuit against the defendant in federal court, demanded trial by jury, and proceeded with discovery. We are satisfied the district court did not abuse its broad discretion in determining that, by reason of her affirmative activity in the district court, the plaintiff waived any objection she may have had to the untimeliness of the defendants' removal petition.

II.

We next address the dispositive question whether the district court erred in determining that it had no personal jurisdiction over the defendants. Plaintiff argues that the court acquired personal jurisdiction over the defendants under any of three provisions of Michigan's long-arm statute: (1) general jurisdiction, under Mich. Comp. Laws. § 600.711; (2) limited personal jurisdiction of a corporation "transacting any business within the state," under Mich. Comp. Laws. § 600.715(1); and (3) limited personal jurisdiction over a corporation which has caused "any act to be done, or consequence to occur, in the state resulting in an action for tort," under Mich. Comp. Laws ¶ 600.715(2).

Because we conclude that the district court acquired limited personal jurisdiction under Mich. Comp. Laws § 600.715(1), the second of three bases asserted by plaintiff, we need not determine whether general jurisdiction

under § 600.711 or limited personal jurisdiction under § 600.715(2) exists.

Mich. Comp. Laws § 600.715(1) provides:

> The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgment against such corporation arising out of the act or acts which create any of the following relationships:
>
> (1) The transaction of any business within the state.

Defendants argue that the Board's limited activities in the state of Michigan do not constitute a transaction of business. They also argue that even if its negligible contacts with Dr. Lanier in Michigan do constitute the transaction of "any business within the state," Dr. Lanier's cause of action did not arise out of those activities.

We disagree, and we do so as a result of a two-step analysis. First, we think the pleadings, affidavits, and related material considered by the trial court demonstrate that the Board must be said to have transacted some slight amount of business with Dr. Lanier in Michigan. Second, we are satisfied that the alleged act of sex discrimination of which she complains—failing her on the oral examination because she is a woman—arose out of the business transacted in Michigan.

A.

The first statutory criterion for finding limited personal jurisdiction under the Michigan statute is "[t]he transaction of any business" in Michigan.

In *Sifers v. Horen*, 385 Mich. 195 (1971), the Michigan Supreme Court, in construing Mich. Comp. Laws ¶ 600.715(1), stated:

> The word "any" means just what it says. It includes "each" and "every." . . . It comprehends the "slightest".

Id., at 199 n.2. Thus, if defendant conducted even the slightest act of business in Michigan, the first statutory criterion for personal jurisdiction under section 600.715(1) is satisfied.

The Board's contacts in Michigan, insofar as they are pertinent to this case, related entirely to the process of considering Dr. Lanier's request for certification as a Diplomate of the American Board of Endodontics. While that process involved Board activity in Arizona, Illinois, and Michigan, our concern, in this first step of the analysis, is whether any part of the process included transacting "any business" in Michigan. The Board responded to Dr. Lanier's request for an application by mailing an application to her in Michigan advising her of the criteria for eligibility for board certification, including payment of the necessary application fees, the necessity of passing first a written and then an oral examination, and the requirement of the submission of case studies to be evaluated by Board officials. Later Board correspondence to Dr. Lanier in Michigan included advice that her studies had been approved, that she had passed the written examination, and that she had not passed the oral examination. She was also invited to retake the oral examination and pay another examination fee for certification. In addition, phone calls were exchanged between Board officials in Chicago and Dr. Lanier in Michigan, in connection with her efforts to learn why she had not passed the oral portion of the certification examination. The contacts between Dr. Lanier and the Board looked to a contractual arrangement whereby the prestige of the Board's certification would be conferred upon Dr. Lanier in Michigan in consideration of her meeting the Board's criteria for certification eligibility, including the payment of the necessary fee and the presentation of the requisite professional credentials. Plainly, the Board's contacts with Dr. Lanier in Michigan were for purposes of establishing a business re-

lationship, albeit of a professional nature. That the business they conducted was for professional and not commercial purposes does not alter its character as a business relationship.

The Board was aware that Dr. Lanier was a practicing dentist in the state of Michigan, and a member of the American Association of Endodontics. In offering to consider Dr. Lanier's credentials or board certification and, if she qualified, to confer upon her the status of Diplomate, the Board's purpose was, at least in part, to affect the quality of dental care being provided to the public in Michigan by raising the standards for endodontic practice.

The Board's statement of Policy and Procedures begins with a statement by Dr. Harry Blechman, past President of the American Board of Endodontics, which includes the following:

> The primary objective of the Board continues to be the protection of the public. The Board does this by raising the standards of endodontic practice through an examination process and by requiring candidates for Diplomate status to show strong evidence of specialized skills and knowledge in endodontics.

Similarly, in its published General State of Policy and Procedure, the Board states in part:

> The American Board of Endodontics is sponsored by the American Association of Endodontists for the following reasons:

1. To meet an existing public need for recognition of those who have special knowledge and skill in the diagnosis and treatment of contiguous pulpal and periapical tissues.
2. To maintain standards of excellence in endodontic practice and determine the competence of applicants who serve the public through limitation of their practice.

Thus, it is at least one of the declared purposes of the American Board of Endodontics to influence the quality of dental care in Michigan by certifying to the general public that certain dental practitioners have been determined to have the requisite education, knowledge, and professional skills in endodontics that they may be relied upon by the public as highly skilled specialists. In addition, it is of no small importance to the Board that it continues to be recognized in Michigan, by Michigan dentists and the public, as the most prestigious national organization for identifying Michigan's most qualified endodontists.

It is manifest that the Board entered into a contract with Dr. Lanier to consider her qualifications and eligibility for Board certification. It is, of course, quite beside the point whether the application process, during which Dr. Lanier engaged in an exchange of correspondence and telephone calls with the defendant Board, resulted in the formation of a contract in Arizona, Illinois, or in Michigan. The point is that the exchange of correspondence and telephone calls between them including particularly the defendants' activity in mailing the application for Board certification to Dr. Lanier in Michigan, advising her by mail of the requirements for board certification, accepting by mail from Michigan the required registration fees, advising Dr. Lanier of the time, date, and location of the written and oral examinations, sending letters to Michigan advising her that she had been rejected and inviting her to sit for a second oral examination, amounted collectively to the transaction of "any" business in Michigan. Neither the presence of the defendant in the state, nor actual contract formation need take place in the forum state for defendant to do business in that state. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the court held:

> Jurisdiction . . . may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of

> suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. *So long as a commercial actor's efforts are "purposefully directed" toward residents of another State [physical absence is not dispositive].*

Id. at 476 (emphasis added).

In view of *Burger King*, defendants are clearly mistaken in asserting that phone calls and mailings cannot constitute "transacting business." Nonetheless, defendants cite several cases to support this position. However, each of the cases is distinguishable. In *Institutional Food Marketing Assoc., Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448 (8th Cir. 1984), plaintiffs sued defendants for declaratory and injunctive relief concerning a contract the parties allegedly entered into in California. Defendants' only contacts with the forum state, Missouri, were phone conversations and letters demanding payment on the last shipment under the contract allegedly entered into in California. The court held these communications insufficient to satisfy the minimum contacts test. *Id.* at 456. But, in that case, the business had already been transacted, the communications to Missouri were for collection, not to transact business. In *Smith v. Piper Aircraft Corp.*, 452 F.2d 823 (5th Cir. 1970), the court rejected plaintiff's contention that when plaintiff sent a letter seeking to sell defendant a plan for retractable landing gears, followed by defendant's letter of rejection, defendant transacted business. But in *Smith*, no business was ever transacted. Plainly that is not the case here. Defendants also cite *First Nat'l. Monetary Corp. v. Chesney*, 514 F.Supp. 649 (E.D. Mich. 1980). *Chesney* actually held that defendants' mailings were sufficient to constitute "transacting business," but were not sufficiently extensive to create the foreseeability of defendants being haled into a Michigan court.

A Michigan appellate court decision recognizing that telephone and mail contact with a party in Michigan may amount to transacting business is *Kiefer v. May*, 46 Mich. App. 566 (1973), in which the court held that a defendant who advertised an antique automobile for sale in a national publication that circulated in Michigan and who, by telephone, represented the auto to be almost complete and accepted defendant's money wired from Michigan, was subject to limited personal jurisdiction in Michigan. *See also, McGee v. Internal Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223 (1957); *Nova Biomedical Corp. v. Moller*, 629 F.2d 190 (1st Cir. 1980), regarding mailings as the basis for transacting "any business" in the forum state.

Hahn v. Vermont Law School, 698 F.2d 48 (1st Cir. 1983), held squarely that defendant's sending an application to plaintiff in Massachusetts upon request, later sending an acceptance letter and accepting plaintiff's deposit of $100, constituted both the transaction of business and a contract formation. Jurisdiction was further justified because these business transactions were not an isolated incident, rather "they were part of VLS' efforts to serve the market for legal education in Massachusetts." *Id.* at 52. Similarly, the Association and the Board have declared that one of their primary purposes is to affect, on a continuing basis, the quality of dental care being provided to the public in Michigan. To that end the Association communicates regularly with its Michigan members, offering professional advice through articles in the Journal of Endodontics, providing information concerning seminars and conferences, and establishing a forum for the exchange of professional information. In addition, the Board communicates regularly with its Michigan Diplomates and is the only nationally recognized authority to which Michigan endodontists may look in the future for Board certification.

Defendant urges the court to ignore *Burger King* and *Hahn* because those cases were contract cases, while this is a tort action. However, jurisdiction lies where any transaction of business gives rise to a cause of action. Neither

the statute nor case law suggest "any transaction of business" be given a different meaning depending upon whether the cause of action is in tort or contract. Contract negotiation and formation are business transactions. It is of no moment, for purposes of determining the existence of jurisdiction, what type of cause of action arises from a business transaction under Mich. Comp. Laws § 600.715(1).

We conclude that the Board's exchange of correspondence and telephone calls with Dr. Lanier in Michigan, including the collection of an application fee as part of an agreement to consider her credentials for Board certification for practice in Michigan, was the transaction of some business in Michigan within the meaning of Mich. Comp. Laws § 600.715(1).

B.

The "transaction of any business" in Michigan by the Board would, however, confer no limited personal jurisdiction upon the District Court unless the cause of action pleaded by the plaintiff arose out of the business transacted there. The "arising out of" requirement is the second criterion for establishing limited personal jurisdiction under Mich. Comp. Laws § 600.715(1).

Defendants insist that even if they transacted business in Michigan, the plaintiff's cause of action, if any, did not arise out of the business that was transacted in Michigan, but from the unfairly evaluated oral examinations given in Arizona and Illinois.

We are unpersuaded that the plaintiff's relationship and contracts with the defendant Board can be logically or legally fragmented in that fashion. The application, evaluation and rejection process was a mosaic of activity which began with the plaintiff's inquiry of the defendants in Illinois about the requirements for board certification and was concluded with the defendants' advice that the plaintiff was denied certification but was invited to reapply; every step of which was a constituent part of the whole. Whether the decision to discriminate occurred before, dur-

ing or after the oral examination administered to the plaintiff is not controlling and indeed may well be a contested matter of proof; it arose from, was occasioned by, and would not have occurred but for the totality of Dr. Lanier's efforts to obtain board certification—efforts which derived, as we have held, from the defendants' limited business contacts with Dr. Lanier in Michigan.

If, as Dr. Lanier claims, the Board rejected her because she is a woman, it must have done so, based at least in part, upon what it learned about her from its professional business contacts with her in Michigan during the very earliest stages of the application process. Whether the final decision to discriminate was made in Illinois, or Arizona, or elsewhere, it must necessarily have arisen from the Board's assessment of facts it obtained as a result of its contact with Dr. Lanier in Michigan, and but for which Michigan contacts it would not have acted upon her application at all and thus would not have made the discriminatory decision.

Two theories exist as to the "arising from" requirement of Mich. Comp. Laws § 600.715(1). In *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972), the Sixth Circuit applied a "made possible" test:

> Both acts [breach of contract and tortious misconduct] and their consequences were made possible only by [defendant's] transaction of business with [plaintiff] . . . Under the circumstances we believe that the cause of action for damage to business reputation grew directly from the transaction of business in Ohio.

Id. at 231. The Seventh Circuit applied a similar test: if the cause of action lies in the "wake" of the business transaction, it arises from it. *In re Oil Spill by Amoco Cadiz off Coast of France*, 699 F.2d 909 (7th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983). *See also, Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209 (7th Cir. 1984).

Clearly the cause of action herein, if one exists, arose from, was "made possible" by, and lies in the "wake" of the application process, much of which occurred in Michigan. Further, Dr. Lanier's application for certification made the discrimination possible and, according to plaintiff's theory, foreordained it.

We are satisfied that the uncontested matters of record show that the defendant Board, and through its principal the Association, transacted some of its business with Dr. Lanier in Michigan—an amount sufficient to be "the transaction of any business"—and that the plaintiff's asserted cause of action arose out of that business. We conclude, therefore, that the Michigan long-arm statute conferred upon the district court jurisdiction over the defendants.[1]

III.

However, the Michigan long-arm statute is subject to constitutional due process considerations. Although the statute may, by its terms, give jurisdiction to the courts, it must also pass constitutional muster as applied in this case. *See, Khalaf v. Bankers & Shippers Court*, 404 Mich. 134 (1978) citing *Kulko v. Superior Court*, 436 U.S. 84 (1978). Under the federal constitution, long-arm jurisdiction may only be asserted if, 1) defendants purposefully availed themselves of the privilege of conducting activities in Michigan; and 2) "the acts of the defendant or consequences caused by the defendant must have had a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable." *Southern Machine Co. v. Mohasco Industries, Inc.*, 401

[1] This is not the first time this same district court has exercised jurisdiction over the Association and the Board. On the basis of essentially identical contacts with Michigan, the district court determined that it had jurisdiction over these defendants in *Dietz v. American Dental Association*, No. 74-70422 (E.D. Mich. 1974). That case is not precedent for what is decided here, however, because there the defendants did not deny that they carried on "a continuous and systematic part" of their general business in Michigan.

F.2d 375, 831 (6th Cir. 1968). *See also, Burger King v. Rudzewicz,* 471 U.S. 462 (1985); *R.L. Lipton Distribution Co. v. Dribeck Importers, Inc.*, 811 F.2d 967 (6th Cir. 1987).

Burger King extensively addressed the constitutional requirements for jurisdiction. The Supreme Court explained that the due process clause protects an individual's liberty interest by requiring that a court exercise jurisdiction only over defendants with "contacts, ties, or relations" with the forum state sufficient to provide them with fair warning their activities may subject them to suit there. *Id.* at 471-72. This "fair warning" requirement has been met when a defendant has " 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* at 472. By requiring these minimum contacts, the constitution provides defendants the opportunity to foresee the possibility of being haled into court, so they can structure their activities accordingly.

By "purposefully availing" itself of opportunities in the forum, such as by purposefully directing itself to forum residents, a defendant opens itself up to that forum's jurisdiction. "[W]here the defendant 'deliberately' has engaged in *significant activities* within a State . . . *or* has created '*continuing obligations*,' between himself and residents of the forum . . . he manifestly has availed himself . . . and . . . it is presumptively not unreasonable to require him to submit to . . . litigation in that forum . . . ." *Id.* at 475-76 (emphasis added). Physical presence of the defendant is irrelevant. "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."[2] *Id.*

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[2] We do not understand the *Burger King* reference to "commercial actor[s]" to preclude application of the rule to non-commercial professional business contacts such as occurred in this case.

At this juncture, it is worthwhile to point out that the question of which party solicited the business interface is irrelevant, so long as defendant then directed its activities to the forum resident. *Southern Machine Co.*, 401 F.2d at 382. Thus, defendants' contention that they did not solicit Lanier's application is irrelevant.

Once plaintiff shows that a defendant purposefully directed its activities towards forum residents, the defendant cannot defeat jurisdiction unless it presents "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477.[3] Yet, the Supreme Court has stopped short of allowing jurisdiction whenever an out-of-state defendant contracts with a forum resident. *Burger King*, 471 U.S. at 478. Rather, prior negotiations, contemplated future consequences, the terms of the contract, and the actual course of dealing need be addressed to evaluate, in a "highly realistic" way, the intended future consequences that are "the real object of the business transaction."

In *Burger King*, the court held the district court in Florida had jurisdiction over a Michigan resident. That Michigan resident had never been to Florida, had no offices there, and no physical contacts there. But, the resident "deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that . . . derive from affiliation with a nationwide organization." *Id.* at 479-80. The franchise negotiation and agreement there-

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[3] *See also McGee*, 355 U.S. 220, wherein the court permitted personal jurisdiction of the California courts over a Texas insurance company solely on the contact of that defendant sending one letter offering insurance to one individual in the forum and collecting premiums therefrom; *First Security Bank v. McMillan*, 627 F. Supp. 305 (W.D. Mich. 1985), which held that a Texan's signing a note guaranteeing a Michigan company's loan had a substantial connection with Michigan justifying jurisdiction there because that loan allowed the Michigan business to continue its business there.

fore had a "*substantial* connection with" Florida. *Id.* at 479 (emphasis in original).

Likewise, *Khalaf*, 404 Mich. at 154, held:

> Since insurers generally seek to sell their services in new territories including other states, and depend on out-of-state business to generate volume, it is ordinarily fair to conclude that their involvement in commercial activity respecting a state is a direct result of a purpose to expand their business.
>
> Insurance agents, on the other hand, do not generally seek to expand their business into other states. They will, nevertheless, find themselves writing insurance for risks in other states as a result of the expansion of their customers' businesses. They become involved in another state, not because of their own purpose to do so, but because of their customers' purpose.

From this distinction, *Khalaf* held that the court had no jurisdiction over the insurance agent; however, the court would have had jurisdiction over an insurance company. The key factor, therefore, seems to be that defendants who generally seek to sell their services in new territories, and depend on such out-of-state business to generate volume, are within the court's jurisdiction.

In this case, the "real object of the business transaction" was threefold. Lanier sought to acquire and exploit board certification in Michigan. The Board sought both to acquire a Michigan resident's fees to offset their own costs, to "contribute to the advancement of . . . endodontics by elevating the standards of endodontic practice . . . through the certification of candidates in that specialty" by adding to its roster of Michigan diplomates, and to extend its influence and prestige in Michigan as the principal national determiner of special competence for the practice of endodontics. Thus, the real object of the Board's contacts with Michigan is to have ongoing, far-reaching consequences in the Michigan dental services market. These consequences are continuous and substan-

tial, affording jurisdiction. *Burger King*, 471 U.S. at 479; *Southern Machine*, 401 F.2d at 381.

The Board is a nationwide organization which depends upon having members in every state of the Union. Defendants have purposefully availed themselves of the opportunity to gain members and certify members in the state of Michigan. Certification has a substantial impact on the state. Thus, it is constitutionally fair for the courts in Michigan to exercise jurisdiction over such defendants.[4]

IV.

Appellees also raise numerous issues which were not discussed by the district court or in the appellant's brief: conflict of laws, choice of laws, the terms of the Elliot-Larsen Act, and the existence of vicarious liability. Because these matters were not addressed by the district court, appellees did not cross-appeal the court's decision not to reach them, and appellant has not addressed them. Although raised in the appellees' brief, these issues are not properly presented on appeal and we shall not ad-

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[4] Again, in *Hahn*, 698 F.2d at 52, the court held jurisdiction would not violate due process because the transactions of applications for law school were not isolated but "were part of [Vermont Law School's] efforts to serve the market for legal education in Massachusetts." Likewise here, the Board's transactions with Dr. Lanier concerning board certification were but a part of its efforts to further influence the quality of dental care in Michigan and enhance its own stature as a certifying organization.

In *Southern Machine Co.*, 401 F.2d at 328-83, the Sixth Circuit defined purposeful availment as follows: "[D]efendant has purposefully availed himself of the opportunity of acting there [in the forum state] if he should have reasonably foreseen that the transaction would have consequences in that state." By becoming board certified, an endodontist makes herself more marketable by enhancing her professional status and attracting more referral patients. Defendants knew plaintiff practiced solely in Michigan and intended to continue to do so. Thus, they should have reasonably foreseen that denying Lanier board certification would have consequences in Michigan.

dress them. Defendants claim we ought to address them because we may affirm the district court's judgment on any ground fairly in the record. However, the district court did not give judgment on any substantive issues but merely made an order on a procedural ground.

Appellees may offer any supportable argument in defense of the district court's conclusion that it lacked personal jurisdiction over defendant, but may not seek this court's review of wholly different substantive law questions; that would be to seek review, reversal and/or modification of the district court's decision not to reach the substantive law questions, a decision that was never appealed from. *See* Annotation, 63 L. Ed. 2d 911 (1980) and cases cited therein.

We REVERSE the decision of the district court finding no limited personal jurisdiction under Mich. Comp. Laws § 600.715(1), and REMAND for further proceedings.

HULL, District Judge, concurring. I agree with the majority's opinion on both the removal question and the issue of long-arm jurisdiction. I write separately, however, to express my reasoning on the issue of long-arm jurisdiction.

As Judge Ryan recognizes, Michigan's long-arm statute provides, in Mich. Comp. Laws § 600.715(1), that the transaction of any business within the state constitutes a sufficient basis on which to find that a corporation is subject to limited personal jurisdiction in Michigan for acts arising out of its business transactions there. The Michigan Supreme Court said in *Sifers v. Horen*, 385 Mich. 195, 188 N.W.2d 623 (1971), that the phrase "the transaction of any business" should be construed broadly, and the Sixth Circuit stated that a defendant has acted to "transact business in a state" when its actions have a "realistic impact" on the commerce of the state. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972). In this case the defendant Board of Endodon-

tics has certified a number of Michigan residents for diplomate status; it depends on the certification of specialists in states such as Michigan for its livelihood; and its ongoing relationships with Michigan dentists in the field of endodontics has a direct impact on citizens of Michigan. Additionally, by publishing the names of diplomates and holding them out as the best practitioners in the field of endodontics, the Board encourages dentists in Michigan to refer patients to Board certified diplomates, and it encourages citizens of Michigan to see these diplomates, rather than specialists not certified by the Board. Therefore, by engaging in these activities, the Board has a direct impact on the commerce of Michigan and it has purposefully availed itself of the privilege of transacting business there.

The dissent relies on *Witbeck v. Bill Cody's Ranch, Inc.*, 428 Mich. 659, 411 N.W.2d 439 (1987), holding that, under the circumstances involved, the exercise of long-arm jurisdiction would violate the Constitution. The decision in *Witbeck* consisted of two cases consolidated for appeal, and in the case relied upon by the dissent, the plaintiff, a resident of Michigan, was injured when she fell off a horse at a dude ranch in Wyoming. The plaintiffs had arranged to vacation at the ranch, and the only contacts the ranch had with Michigan were through one advertisement in a tour guide, that the plaintiffs saw in Michigan, and a brochure mailed to the plaintiffs in Michigan following a telephone conversation with them. The ranch had only limited contact with a very small number of Michigan residents, and the Michigan Supreme Court was correct in ruling that this limited number of contacts was not a sufficient basis on which to exercise personal jurisdiction.

Witbeck, however, is distinguishable from the present case. The Board of Endodontics had much more substantial contacts with the state of Michigan. It set itself out as an expert in the field of endodontics, it established mandatory standards that Michigan dentists must meet in order to obtain diplomate status, and it established channels for providing regular advice and service to den-

tists in Michigan who desire certification. It was recognized in *Asahi Metal Inc. Co. v. Superior Court of California*, ____ U.S. ____, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), that establishing channels for providing service to customers in the forum state is one indication that a defendant is subject to personal jurisdiction there. *Id.* 107 S.Ct. at 1033, 94 L.Ed.2d at 104.

Additionally, the Supreme Court in *Asahi* stated that the reasonableness of the exercise of jurisdiction depends in part on the interests the forum state has in adjudicating the dispute. *Id.* 107 S.Ct. at 1034, 94 L.Ed.2d at 105. In the present case, a number of Michigan residents are affected by the Board's activities, and the State of Michigan has a compelling interest in the Board's actions because of its important duty of seeing that residents of Michigan receive quality dental care. In *Witbeck*, only a small number of Michigan residents, who chose to vacation at the ranch, were affected by the defendant's actions, and no service necessary to the well-being of Michigan citizens was involved. Therefore, because of its interest in seeing that Michigan residents are provided with a high caliber of dental care, Michigan's interest in adjudicating disputes involving the Board of Endodontics is much greater than any concern it has with adjudicating disputes involving a ranch in Wyoming.

In *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983), cited in the main opinion, the First Circuit stated that the key question in deciding whether personal jurisdiction exists over a defendant holding itself out as an educator or certifying body is whether the defendant engaged in any activity constituting the transaction of business relating to the plaintiff's decision to apply. *Id.* at 50. Here, the Board of Endodontics clearly engaged in activity which encouraged Ms. Lanier and other specialists in the field to apply for its diplomate status. The Board of Endodontics had numerous certified specialists in Michigan, and its supposed expertise was well known in the state at the time Ms. Lanier applied. Over the years, dentists and Michigan residents have consistently relied on

the Board to supply references for specialists in the field of endodontics. Therefore, the Board's contact with Ms. Lanier was not an isolated occurrence, but, to the contrary, arose from its direct efforts to serve the market for its product, Board certification. Therefore, according to the Supreme Court, the exercise of personal jurisdiction over the Board and its parent organization in Michigan is proper. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Additionally, the facts of this case are unlike the facts in the Supreme Court case of *Asahi Metal Inc. Co. v. Superior Court*, ____ U.S. ____, 107 S.Ct. 1026, 94 L.Ed. 2d 92 (1987), relied upon by the dissent. In *Asahi*, an attempt was made by a Taiwanese manufacturer to sue a Japanese corporation for indemnity in a California court. The Japanese corporation claimed that mere awareness and foreseeability on its part that components it manufactured would end up in California was an insufficient basis on which to base personal jurisdiction over it in California. The Supreme Court was divided on the issue of whether the Japanese corporation had the requisite minimum contacts needed to subject it to personal jurisdiction in California. The Court, however, unanimously ruled that it was unreasonable to expect a Japanese corporation to appear in court in California to defend against a Taiwanese corporation.

The Japanese corporation in *Asahi* was in a position similar to that of an importer or manufacturer selling to independent wholesalers, who then decide to provide the product to retailers in various states. The Sixth Circuit has ruled that in cases of this type, a manufacturer is not subject to jurisdiction in a forum merely because it was foreseeable that its products would eventually arrive there. *See R. L. Lipton Distribution Co. v. Dribeck Importers, Inc.*, 811 F.2d 967 (6th Cir. 1987).

The facts in the present case are quite different from those in *Asahi* or *Dribeck Importers, Inc.* Ms. Lanier is a Michigan resident who has been seriously affected by the defendant Board's activities and this is not a case in-

volving two foreign parties, as was the situation in *Asahi*. Furthermore, even if the requisite minimum contacts for the exercise of personal jurisdiction did not exist in *Asahi* and *Dribeck Importers, Inc.*, they do exist in the present case. In *Asahi*, the Japanese corporation merely provided component parts to manufacturers who incorporated these parts into their products and shipped the products out, with some of them ending up in California. The Japanese corporation had no direct contact with citizens of the forum. 107 S.Ct. at 1033, 94 L.Ed.2d at 105. Likewise, in *Dribeck Importers, Inc.*, the defendant importer merely provided its product, Beck's Beer, to independent distributors who then provided the beer to retailers in various states. The importer, itself, had engaged in no meaningful contacts with the forum. 811 F.2d at 970. Ms. Lanier, on the other hand, did have direct contact with the Board of Endodontics, and it maintained ongoing ties with the state of Michigan because of its undertaking to certify individuals capable of providing quality dental care in the field of endodontics. Therefore, the relationship the Board had with Ms. Lanier and other citizens of Michigan was much stronger than the tenuous ties involved in *Asahi* and *Dribeck Importers, Inc.*

Accordingly, for the reasons stated above, it is my opinion that the defendants are subject to personal jurisdiction in Michigan, pursuant to the State of Michigan's long-arm statute, and also that it is constitutionally permissible to subject the defendants to personal jurisdiction in Michigan. I reach this conclusion because the defendants purposefully availed themselves of the privilege of transacting business in Michigan, the plaintiff's cause of action arose from the defendants' activities there, and it is reasonable to expect the defendants to defend this lawsuit in Michigan.

KRUPANSKY, Circuit Judge. Concurring in part, dissenting in part. I concur with the majority's assessment that plaintiff has waived any objection she may have had to

the untimeliness of the defendants' removal petition. However, because the majority's decision addressing the issue of long arm jurisdiction does not comport with Michigan law or Supreme Court pronouncements, I am constrained to respectfully dissent from the disposition of that issue.

The instant dispute arose as a result of the plaintiff's application for "Diplomate" status with the Board of Endodontics, which certification in essence constitutes an imprimatur of excellence in the field of endodontics. The defendant organizations are Illinois non-profit corporations which maintain their sole respective offices in Chicago, Illinois. Neither owns property, maintains offices, officers, agents, employees, bank accounts, books, records, or phone listings in the State of Michigan, or is licensed to or has authorized employees to conduct business in that state, although the Association has certified a number of qualified Michigan residents with "Diplomate" status. Defendants did not nor do they presently advertise to solicit applicants for Diplomate certification. Plaintiff voluntarily initiated the Board's certification procedure by requesting an application through the mail. The Board responded by telephone and through correspondence. The plaintiff thereafter successfully completed the written and case study section of the admission examination, but failed two successive oral examinations conducted in Phoenix, Arizona, and Chicago, Illinois, respectively.

The plaintiff's cause of action was initiated in a Michigan state court and charged the Board with sex discrimination in rejecting her application for certification as a Diplomate. Plaintiff alleged that the Board's rejection violated the Michigan Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.210 *et seq.* Asserting diversity of citizenship, the defendants removed the case to federal district court. Plaintiff challenged the removal petition as untimely and moved for a remand to state court. The federal district court denied the plaintiff's motion to remand and granted the defendants' motion to dismiss for lack of in personam jurisdiction. From these rulings, plaintiff has appealed.

In determining if, in a diversity case, a federal court may exercise personal jurisdiction over a non-resident defendant, it must initially determine if personal jurisdiction existed under the law of the forum state and if the exercise of personal jurisdiction was consistent with due process. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 490 (1945).

In the instant case, the pertinent Michigan long arm statute reads as follows:

> The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgment against such corporation arising out of the act or acts which create any of the following relationships:
>
> (1) The transaction of any business within the state. Mich. Comp. Laws § 600.715(1).

Although Michigan courts have at times indicated that they intended their long arm statute to reach the outmost limits permitted by due process,[1] this Circuit has concluded that the "Michigan courts are, in fact, stopping short of that boundary." *Rann v. McInnis*, 789 F.2d 374, 377 (6th Cir. 1986). "Our duty in this post-*Erie* diversity case is to stop where the Michigan courts have drawn the line and not push jurisdiction to the limits of due process." *Id.* at 377; C. Wright, *The Law of Federal Courts* § 64 at 420-421.

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[1] *City Suburban Agency, Inc. v. Dade Helicopter Services, Inc.*, 141 Mich. App. 241, 366 N.W.2d 259 (1985); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1236 (6th Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981); *Ag-Chem Equipment Co., Inc. v. Avco Corp.*, 666 F.Supp. 1010 (W.D. Mich. 1987).

Although some Michigan courts have declared that the term "any business" comprehends, "the slightest business",[2] the Sixth Circuit has ruled that the "any business" requirement is not satisfied unless "obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state." *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 226 (6th Cir. 1972).

In the instant case, the Board's contacts within Michigan do not rise to that level. The majority urges that the Board, by furnishing applications upon request, by accepting applications with a processing fee, by corresponding and communicating and by entering into what the majority has characterized as a prospective "contractual arrangement" with the plaintiff has satisfied the condition of transaction "any business" within the meaning of Mich. Comp. Laws § 600.715(1).

Such an expansive interpretation has, at least at this writing, not been embraced by the Michigan courts which have, as noted by this Circuit, expressly avoided overextending the reach of that state's long arm statute. Indeed, in the latest Michigan Supreme Court ruling interpreting the scope of its long arm jurisdiction on facts strikingly similar but far more compelling than those of the instant case the court found that a dude ranch which advertised in a regional tour guide, participated in a nationwide appointment service, entertained interstate telephone conversations and mailed brochures and letters advertising its recreational facilities to prospective guests could not be subjected to in personam jurisdiction because its activities were insufficient to support an exercise of jurisdiction. "Such tenuous threads which purportedly link the defendant to Michigan are not akin . . . to a deliberate undertaking to do or cause an act or thing to be done in Michigan . . ." *Witbeck v. Bill Cody's Ranch, Inc.*, 428 Mich. 659, 411 N.W.2d 439, 446 (1987), *citing Khalaf v.*

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[2] *See, e.g.. Sifers v. Hoven*, 385 Mich. 195, 188 N.W.2d 623 (1971).

Bankers & Shippers Ins. Co., 404 Mich. 134, 153, 273 N.W.2d 811 (1978). *Witbeck* is not meaningfuliy distinguishable from the instant case. The *Witbeck* court has cautioned that over-reliance on telephone calls and correspondence to establish jurisdiction would unduly "burden businesses in Michigan as well as in other states." *Id.* at 446. *See also Rann v. McInnis*, 789 F.2d 374 (6th Cir. 1986) (exercise of personal jurisdiction improper under Michigan law despite defendant's "solicitation" of plaintiffs by telephone).[3]

Plaintiff has also charged in this appeal that the Board's act of "entering into a contract with Dr. Lanier" satisfied the term "transaction of any business." Clearly, the *Witbeck* court has rejected that argument. In *Witbeck*, the Michigan plaintiff confirmed a reservation with the defendant ranch in Wyoming and entered into a "contract" for services. In considering the facts supporting the acceptance of the plaintiff's reservation, the *Witbeck* court correctly noted that the contract was one which caused a Michigan resident to "leave the state and to go to Wyoming." 411 N.W.2d at 446. This type of an agreement did not, in the opinion of the court, give rise to a "substantial connection" with Michigan, and therefore, jurisdiction could not constitutionally be exercised. *Id.* Similarly, in the instant case, the "contract", if one existed, between the Board and Lanier was one which, as in *Witbeck*, caused the Michigan resident to "leave the state" and travel to Arizona and Chicago for her oral examinations.

The Supreme Court and the Sixth Circuit have substantially adopted the rationale of *Witbeck* in concluding that agreements which do not result in "continuing obligations"

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[3] In other jurisdictions, mailings, correspondence, or phone calls do not suffice to support the exercise of personal jurisdiction under similar "transacting business" provisions. *See, e.g., Institutional Food Mktg. Associates v. Golden State Strawberries, Inc.*, 747 F.2d 448, 456 (8th Cir. 1984); *Smith v. Piper Aircraft Corp.*, 425 F.2d 823, 825 (5th Cir. 1970); *Selman v. Harvard Medical School*, 494 F. Supp. 603, 612 (S.D.N.Y.), *aff'd*, 636 F.2d 1204 (2nd Cir. 1980).

between the forum state plaintiff and the non-resident defendant are insufficient to support the invocation of long arm personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-476, 105 S. Ct. 2174, 2185-2186, 85 L.Ed.2d 528 (1985). The instant defendants clearly did not enter into a "continuing relationship" with the plaintiff. Indeed, the exchange of information between the plaintiff and the Board contemplated no continuing relationship between them because the Board procedurally retained the option to reject any application, which option it elected to ultimately exercise in rejecting Lanier's professional qualifications for certification. Accordingly, upon the facts of this case the purported contract between the parties gave rise to a relationship insufficient to support the exercise of jurisdiction. *Cf. Hooks v. Hooks*, 771 F.2d 935, 945 (6th Cir. 1985) (an individual's contract with an out of state party insufficient to establish minimum contacts in other party's home forum); *Rann*, 789 F.2d at 376 (contract consisting of receipt of Michigan Blue Cross/Blue Shield payments, combined with solicitation of plaintiffs over the telephone, did not warrant exercise of Michigan's long arm statute).[4]

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[4] *Hahn v. Vermont Law School*, 698 F.2d 48 (1st Cir. 1983) is readily distinguishable on its facts from the instant case. In *Hahn*, the plaintiff's application for admission into Vermont Law School (VLS) had been duly accepted and he had in fact attended that institution for a period of three years and had been awarded his law degree. His breach of contract cause of action against VLS stemmed from his receipt of a failing grade and his efforts to resolve the matter through administrative channels which concluded in a disposition which he considered unsatisfactory. The First Circuit decision invoking the Massachusetts Long Arm Statute described the extensive activities of VLS within Massachusetts as factually satisfying the "transacting any business" language of the Massachusetts statute:

> In 1980 and 1981 VLS faculty members visited five Massachusetts colleges for the purposes of recruiting. The school at times also has placed advertisements in Boston newspapers. Under these circumstances, the assertion of jurisdiction over

(Footnote continued on following page)

Additionally, the Board's broad statement of principle to "protect the public" by "raising the standards of endodontics . . ." fails to support an argument to invoke Michigan long arm jurisdiction. Indeed, no court has supported the exercise of jurisdiction based upon such generalizations. Notably, the statement is not directed to the state of Michigan or identifiably to any other specific state. The statement of principle, unsupported by specific overt action within or directed toward residents of Michigan that would constitute a "transaction of business", is of no consequence in considering the case at bar. To the contrary, the activities relied upon by the appellant to support the "transaction of business", i.e., phone calls and limited correspondence, have clearly been repudiated as insufficient to invoke jurisdiction.

I also find that the appellant has failed to allege facts to support the second prong of the Michigan long arm statutory test—namely that plaintiff's tort claim must "arise out of" the "transaction of any business." Numerous courts have held that tort claims do not "arise out of" mere solicitations, advertisements, or telephone contacts. *See e.g. Singletary v. B.R.X., Inc.*, 828 F.2d 1135 (5th Cir. 1987) (products liability claim did not "arise out of" advertisements in trade magazines); *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986) (hotel slip and

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[4] *continued*

> VLS in Massachusetts does not offend traditional notions of fair play or substantial justice.

Moreover, it is significant to note that unlike the Michigan Supreme Court's pronouncements defining the scope of its long arm statute, the First Circuit noted that:

> ". . . [t]he Massachusetts courts have not defined the scope of the "arising from" requirement of the long-arm statute. . ."

Factually apparent in *Hahn* was the existence of a valid agreement evidenced by the acceptance of Hahn's application for enrollment as a student at VLS and the intent of the parties to enter into a "continuing relationship" for the period of his attendance at the institution.

fall accident did not "arise out of" reservation contract and advertisements); *Pearrows v. Nat'l. Life and Accident Ins. Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983) (theme park's supplying of brochures to forum state plaintiff not sufficiently connected to tort action at theme park; tort action did not "arise out of" supplying of brochures). In short it cannot be said that any alleged acts of discrimination "grew directly" from the contacts at issue. *In Flight Devices Corp.*, 466 F.2d 220, 223 (6th Cir. 1972). Accordingly, I must respectfully conclude that the Board's contacts with Michigan fall short of the "transacting business" or "arising out of" requirements of the Michigan long arm statute.

Apart from the foregoing statutory analysis, the exercise of jurisdiction would also impinge upon constitutional protections. In evaluating the due process standard applicable to long-arm jurisdiction issues, this court must consider a three-part analysis:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state . . . Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

R.L. Lipton Distribution Co. v. Dribeck Importers, Inc., 811 F.2d 967, 969 (6th Cir. 1987).

The first two elements of the Sixth Circuit test are similar to the long-arm statutory analysis already discussed, *supra*. As demonstrated, *supra*, plaintiff has not shown that the defendants purposefully availed themselves of the privilege of acting in the forum state. Nor did the cause of action arise from the defendants' activities within the forum state. However, the third prong of the Sixth Circuit test provides an independent hurdle—the acts or consequences caused by the defendant must have had a substantial connection with the forum state to make the ex-

ercise of jurisdiction over the defendant reasonable. Appellants have not alleged sufficient facts to satisfy this third requirement. "While the first two elements of the test involve a search for the specific types of contacts which have been held essential to the maintenance of jurisdiction, the third demands flexibility and an appraisal of the overall circumstances of each case." *In-Flight Devices*, 466 F.2d at 266; *Ag-Chem Equipment Co.*, 666 F. Supp. at 1013.

The Supreme Court discussed this third element in its decision in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987). In that case, the court unanimously found that the assertion of jurisdiction over a Japanese manufacturer would "offend traditional notions of fair play and substantial justice," the equivalent of the third prong of the three-part test of jurisdiction enunciated by the Sixth Circuit. *Ag-Chem Equipment Co.*, 666 F. Supp. at 1014.

Asahi, like the instant defendants, had no office, agent, employees, or property in the forum state. Neither Asahi nor the defendants in this case advertised or solicited business in the forum state. *Id.* at 1033. Moreover, in both *Asahi* and in this case, plaintiff's primary argument supporting jurisdiction was that defendant was an interstate actor, "aware" that its acts would eventually affect the forum state, and "depending on out-of-state business to generate volume." *Asahi*, 107 S. Ct. at 1031, 1033.

The Supreme Court unanimously rejected the plaintiff's argument in *Asahi*. The Supreme Court has announced that a defendant's mere awareness that its actions may affect many states does not suffice for justifying long-arm jurisdiction in a particular state. Nor is a defendant's indirect benefit from transactions in a forum state a "persuasive factor in the jurisdictional inquiry." *Id.* at 1031, 1033. A generalized desire to serve the national market by selling products or services in the nationwide "stream of commerce" does not suffice for purposes of due process. *Id.* at 1033.

Accordingly, such factors as the Board's desire to protect the public throughout the nation, its dependence on "out-of-state business to generate volume," or its status as a "nationwide organization" do not render the exercise of jurisdiction consistent with "notions of fair play and substantial justice."[5]

Given this set of facts and given the clear authority of recent case law, the isolated phone calls and letters of the Board, unrelated to the cause of action, simply do not suffice as "minimum contacts" or constitute "transaction of business" significant enough to constitutionally trigger the long arm statute.

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[5] The plaintiff's reliance upon *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985) is misplaced. In upholding the Florida Long Arm Statute, the court concluded that a Michigan franchisee who deliberately reached out beyond his state of residence, who negotiated and executed a long term franchise, who accepted the manifold benefits that would arise from affiliation with a nationwide organization, who entered into a carefully structured 20-year relationship which envisioned continuing and wide-reaching contacts within Florida, who accepted regulation of his Michigan business from the Miami headquarters of the franchisor and who was required to make monthly payments to the franchisor in Miami could constitutionally be subjected to the long-arm jurisdiction of Florida in a dispute arising out of the franchise arrangement. The court's specific factual findings, coupled with the stipulation of the parties to the franchise agreement that the franchise contract "shall be deemed made and entered into in the state of Florida and shall be governed and construed under and in accordance with the laws of the state of Florida," supported the court's decision that the "quality and nature" of the business relationship could not be viewed as "random," "fortuitous," or "attenuated" and contemplated a continuing long term relationship between the parties of sufficient consequence to support the invocation of Florida's Long Arm Statute. Certainly, the extensive relationships that were contemplated and which actually existed between the parties within the State of Florida comparably overwhelm the inconsequential limited correspondence and telephone conversations between the parties that the plaintiff has relied upon to satisfy the "transacting any business" and "arising from" requirements of the Michigan statute.

Accordingly, I would conclude that upon the facts of this case the defendants' contacts within the State of Michigan did not satisfy either the "transaction of any business" element nor the "arising out of the act" requirements of Michigan's long arm statute. To hold otherwise would offend notions of fair play and substantial justice thereby infringing upon the due process protections of the Fourteenth Amendment. I would affirm the district court's disposition in its entirety.

APPENDIX B

[Dated June 14, 1988]

No. 85-1645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOAN ELENA LANIER,

Plaintiff-Appellant,

v.

THE AMERICAN BOARD OF ENDODONTICS;
AMERICAN ASSOCIATION OF ENDODONTISTS,

Defendants-Appellees.

ORDER

BEFORE: KRUPANSKY and RYAN, Circuit Judges, and Hull*, Chief United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

John P. Hehman, Clerk

* Hon. Thomas G. Hull, Chief Judge, sitting by designation from the Eastern District of Tennessee

APPENDIX C

[Dated July 9, 1985]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 84-5069
Hon. Richard F. Suhrheinrich

JOAN ELENA LANIER,

Plaintiff,

v.

THE AMERICAN BOARD OF ENDODONTICS,
a corporation,

Defendant.

Civil Action No. 84-5398
Hon. Richard F. Suhrheinrich

JOAN ELENA LANIER,

Plaintiff,

v.

THE AMERICAN ASSOCIATION OF ENDODONTISTS,
and THE AMERICAN BOARD OF ENDODONTICS,

Defendants.

MEMORANDUM OPINION

Because of an apparent "error" on the part of plaintiff, there are two lawsuits pertaining to the same alleged wrong—i.e., defendants allegedly refused to grant plaintiff Diplomate status in the American Board of Endodontics because of her sex and race in violation of the Michigan Elliott-Larsen Civil Rights Act, M.C.L.A. ¶37.2101 *et seq.* This matter is currently before the Court upon plaintiff's motion to remand Civil No. 84-5069 and defendants' motions to dismiss both complaints or, in the alternative, for change of venue. Pursuant to Local Rule 17(j), the Court will determine the motions without oral hearing.

A. *Procedural History*

Plaintiff filed her original complaint against the American Board of Endodontics (Board) on September 24, 1984. On September 27th, the Board received by certified mail a copy of the summons and complaint. Service of process, however, was completed on October 5, 1984, when the Cook County Sheriff served a representative of the Board at its office in Chicago, Illinois. On November 2, 1984, the Board filed its petition for removal based upon diversity of citizenship.

A second suit was filed by plaintiff on November 27, 1984, against the Board and the American Association of Endodontists (Association). This matter was assigned to Judge Taylor. Plaintiff asserts that it was a clerical mistake which caused this second suit to be filed instead of merely filing an amended complaint in the first action to add the Association as a party-defendant before a responsive pleading had been filed. Pursuant to Local Rule 8, the second suit was reassigned to this Court.

B. *Plaintiff's Motion to Remand*

Plaintiff moves to remand the first suit to state court on the ground that the petition for removal was not filed within thirty days of the Board's receipt of the summons and complaint by mail. The Board argues that the thirty-day period did not commence to run until service of process

was completed on October 5, 1984. Assuming *arguendo* that the petition was untimely, the Board argues that plaintiff waived any right to remand based upon a technical defect because plaintiff sought and accepted stipulations, filed discovery requests, filed new pleadings and made a jury demand in federal court.

The time for filing a removal petition is fixed by 28 U.S.C. §1446(b) which provides in part:

> The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, *through service or otherwise*, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . . (emphasis added).

"[T]he statute requires that the removal petition be filed within thirty days after the [defendant] receives through service of process or otherwise, a summons or copy of the complaint." *Wilson v. U.S. Dept. of Agriculture, Food and Nutrition Service*, 584 F.2d 137, 140 (6th Cir. 1978). Because removal is a purely statutory right, courts have uniformly held that removal should be strictly construed in favor of state court jurisdiction. *Shamrock v. Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Wilson*, 584 F.2d at 142; *Goodman v. Sears, Roebuck and Co.*, 588 F. Supp. 121, 123 (E.D. Mich. 1984).

After a review of the case law and legislative history of §1446, the Court concludes that the time for removal began to run when defendant was served by mail with a summons and copy of the complaint on September 27, 1984. To hold otherwise would be contrary to the congressional intent expressed by the 1948 and 1949 amendments of §1446 which provided for more uniformity in the removal process. Were the Court to adopt the Board's contention that the time for removal began to run when service upon defendant was perfected, the Court would be reading into the statute a provision which is not there and one which Congress omitted; state service of process statutes would once again allow the litigants to manipulate

when the time for removal began. The Court finds that the words "receipt by the defendant, through service or otherwise" means receipt by service or some action which is the equivalent of service. *Skinner v. Old Southern Life Ins. Co.*, 575 F. Supp. 811, 813 (W.D. La. 1983) (receipt of unconformed complaint sent to defendant as a courtesy copy was not received through service or any equivalent thereof); *Barr v. Hunter*, 209 F. Supp. 476, 477 (W.D. Mo. 1962) (time to file petition for removal began to run upon receipt of complaint, not from the filing of the return receipt card which perfected service); *Potter v. Kahn*, 108 F. Supp. 593, 594 (S.D. N.Y. 1952) (thirty day period began with receipt of complaint by mail, not upon completion of service by publication where both methods were required for proper service). This interpretation does not run contrary to *Love v. State Farm Mut. Auto. Ins. Co.*, 542 F. Supp. 65 (N.D. Ga. 1982). In *Love*, the court held that sending a copy of the complaint which did not contain a docket number or any indication of when, if at all, it had been filed to defendant's regional office did not "trigger" the removal period. 542 F. Supp. at 68. The court concluded that service of process was a prerequisite to the commencement of the removal period. The rationale was that a defendant should not be compelled to remove a suit before having actual knowledge that the suit had been filed. *Id.* at 67. *See Skinner*, 572 F. Supp. at 813.

In the present case, the Board did not receive notice of this lawsuit through informal service. On the contrary, plaintiff served defendant pursuant to 1963 GCR 105.4(2) which requires two acts: 1) personal service and 2) service by registered mail. The Board did not receive a courtesy copy on September 27, 1984; it received a *summons and a copy of the complaint.* At that time, the Board had actual knowledge of the lawsuit. Pursuant to the plain language of §1446(b), the removal period began on September 27, 1984. The Board's petition for removal was not timely filed.

The Board argues that plaintiff has waived any objections to untimeliness by requesting and receiving stipula-

tions, and filing discovery requests, new pleadings and a jury demand. Although a party may waive objections to procedural defects in removal, a waiver will be found only when there is "affirmative conduct or unequivocal assent of a sort which would render it offensive to fundamental principles of fairness to remand." *Feller v. National Enquirer*, 555 F. Supp. 114, 1121 (N.D. Ohio 1983) (quoting *Maybruck v. Haim*, 290 F. Supp. 721, 724 (S.D. N.Y. 1968)). Examples of such conduct include the unsuccessful litigation of a substantive issue or filing an amended complaint.

Plaintiff in this case has engaged in "affirmative" conduct by filing the second complaint. It was intended to be filed as an amended complaint. Plaintiff sought to bring another defendant within this Court's jurisdiction. The Court finds that plaintiff waived her objection to the untimeliness of the Board's petition for removal. Plaintiff's motion to remand is denied.

C. *Defendants' Motion to Dismiss for Lack of Personal Jurisdiction.*

Defendants move to dismiss the complaint for lack of personal jurisdiction on the ground that they do not have the requisite contacts with the State of Michigan to satisfy the "continuous and systematic" business requirement of Michigan's general jurisdiction statute, M.C.L.A. §600.711(3). Plaintiff contends that defendants' use of mailings, correspondence, telephones and receipt of fees are sufficient contacts to confer jurisdiction under the Michigan "long-arm" statute, M.C.L.A. §600.715, which confers "limited personal jurisdiction" for actions arising out of defendants' activities in the state. It is plaintiff's position that her discrimination claim is a "consequence" of defendants' conduct within the meaning of §600.715(2). Plaintiff also argues that this Court may exercise general personal jurisdiction over the Association because it conducts continuous and systematic business in Michigan by soliciting members to attend seminars, conventions or other pro-

fessional activities of interest to endodontists. M.C.L.A. §600.711(3).

Plaintiff bears the burden of proving personal jurisdiction over the defendants. *Armbruster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983) (quoting *Welsh v. Gibbs*, 631 F.2d 436, 438-39 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981)). When a motion to dismiss for lack of personal jurisdiction is supported by affidavits, the nonmoving party may not rest upon the allegations in her pleadings but must set forth specific facts showing that the court has jurisdiction over the defendants. *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929-30 (6th Cir. 1974).

In the present case, the Board and the Association submitted affidavits from Dr. John W. Harrison, the Board's secretary-treasurer and a member of its board of directors, Letty Catrambone, the Board's sole employee, and Irma Kudo, the Association's Executive Director.

Dr. Harrison and Ms. Kudo stated that the Board and the Association are Illinois not-for-profit corporations who maintain their sole respective offices in Chicago, Illinois. Neither defendant owns property in Michigan, maintains officers, agents, employees, bank accounts, books or records, or phone listings in Michigan, has authorized employees to conduct business in Michigan, or is incorporated or licensed to do business in Michigan. The only board of directors meeting ever held in Michigan was conducted in 1965. The last written examination offered in Michigan was conducted in December 1966. Since 1977, the written examination has been given annually in Chicago.

Dr. Harrison stated that the purpose of the Board is "to contribute to the advancement of . . . endodontics by elevating the standards of endodontic practice . . . through the certification of candidates in that specialty." The Board "entertains" applications from candidates who have completed specialized endodontics programs. If the candidates successfully pass the written, oral and case studies examinations, they will be granted Diplomate status. This is not a prerequisite to practicing endodon-

tics. Harrison aff. at 2. The Board's work is divided into two categories:

> A. The substantive work of The American Board of Endodontics is conducted by the nine members of its board of directors. The board of directors meets twice each year, once in Chicago and once in another city. At those semi-annual meetings, among other activities, the board of directors conducts the oral examination of candidates for Diplomate status. Dr. Joan Lanier failed the oral examination offered in April, 1982, in Phoenix, Arizona and in October, 1982 in Chicago, Illinois.
>
> B. The efficient functioning of The American Board of Endodontics requires that certain ministerial tasks such as filing and correspondence be performed on a regular basis. The American Board of Endodontics employs a single employee to perform these ministerial tasks.

Id. at 3. Since 1981, none of the Board's directors have resided or had their principal place of business in Michigan.

Dr. Harrison also stated that the Board "has neither purchased nor circulated any advertisement or paid announcement . . . in . . . Michigan . . . [or] actively advertised or solicited endodontists to apply for Diplomate status." *Id.* at 13.

Ms. Catrambone, the Board's administrative secretary, avers that she primarily prepares and maintains the Board's files and records at its office in Chicago. Ms. Catrambone also prepares the correspondence to Diplomates and the applicants. Catrambone aff. at 2.

Ms. Kudo stated in her affidavit that the only annual Association meeting ever held in Michigan was conducted in 1965. Since then, the board of directors and the executive committee have not conducted a meeting in Michigan. The Association does publish a monthly professional journal and/or newsletter. "These publications are distributed to the Association members as an incident of their

membership." Kudo aff. at 16. The Association also sponsors educational programs at its annual sessions, but has never sponsored a program in Michigan. Ms. Kudo also stated:

> As its principal means of obtaining new members the Association sends correspondence to students enrolled in advanced endodontic programs accredited by the Commission on Dental Accreditation. That correspondence informs the students that they are eligible to become student members of the Association. When student members graduate from accredited advanced endodontic programs, the Association sends them correspondence advising them that they are now eligible to become active members of the Association. In addition to students and recent graduates, some practicing endodontists do apply for and obtain membership in the Association. Communications with such applicants is handled from our Chicago office via the United States Postal Service.

Id. at 21.

Plaintiff has responded by way of an affidavit with exhibits attached. Plaintiff avers that she is presently a citizen of Michigan and a member of the Association and pays annual dues. In return for her dues, the Association mails to her announcements for seminars and conventions. The most recent "solicitation" has been for the annual convention in San Diego, California. Plaintiff also receives the *Journal of Endodontics* on a monthly basis. "In 1979, [plaintiff] requested the American Board of Endodontics to forward to [her] an application for certification." Lanier aff. at 7. The Board promptly responded. Plaintiff sent in her application with the requisite fee and was informed that the written examination would take place in Chicago. Plaintiff went to Chicago, took the examination and was later notified that she had passed. Plaintiff then compiled her case studies and submitted them by mail to the Board in Chicago. After her successful completion of the case study portion of the certificate process, plaintiff went to Phoenix, Arizona for the oral

examination. After receiving notification that she failed the oral exam, plaintiff submitted her reapplication fee for the second oral examination. In October 1982, plaintiff took the oral exam in Chicago, but failed. None of the examiners, for either exam, were from Michigan. Plaintiff wrote to the Board for an explanation as to why she failed the exams, but the Board declined to disclose the individual evaluations of the examiners.

The amenability to suit of a nonresident party is determined under a two-prong test. First, the court must decide whether the forum state's statute authorizes jurisdiction over the nonresident. Second, the court must decide whether this jurisdictional reach is constitutional. *National Can Corp. v. K Beverage Co.*, 674 F.2d 1134, 1136 (6th Cir. 1982).

Contrary to plaintiff's assertion that the Michigan "long-arm" statute applies in this case to confer "limited personal jurisdiction" over the defendants, the Court finds that plaintiff's claim does not arise out of either defendant's activities in the state. Plaintiff alleges that the Board discriminated against her on the basis of race and sex when "[p]laintiff was disqualified from Board Certification on the basis of a purely subjective examination process . . . ." Complaint at 17. On the record before the Court, it is undisputed that plaintiff initiated the certification process by requesting an application from the Board. The Board did not solicit plaintiff's application; nor did the Association solicit plaintiff's application for Diplomate status by sending information to recent endodontics graduates concerning their membership with the Association.[1] Unilateral acts by plaintiff in the forum state do not constitute the minimum contacts that justify the exercise of personal jurisdiction over a nonresident defendant. *Raymond T. Danto, Associates, Inc. v. Arthur D. Little, Inc.*,

[1] Membership in the Association does not appear to be a prerequisite to certification by the Board. The record discloses that the decision to grant Diplomate status lies solely with the Board.

316 F. Supp. 1350, 1354 (E.D. Mich. 1970). Viewing the pleadings and affidavits in the light most favorable to plaintiff, *Welsh v. Gibbs*, 631 F.2d at 439, it is clear that the alleged discrimination—the decision not to grant plaintiff Diplomate status, occurred in Phoenix and/or Chicago and does not arise out of or related to defendants' use of mailings, correspondence, telephones and receipt of fees, or the Association's solicitation of new members. *See Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984).

The fact that plaintiff may have suffered economic and emotional harm from the alleged discrimination in Michigan does not confer specific or limited personal jurisdiction within the meaning of M.C.L.A. §600.715(2). *Amburn v. Harold Forster Ind., Inc.*, 423 F. Supp. 1302, 1307 (E.D. Mich. 1976); *Storie v. Beech Aircraft Corp.*, 417 F. Supp. 141, 145 (E.D. Mich. 1976). The Court must therefore determine whether M.C.L.A. §600.711(3) authorizes the exercise of general personal jurisdiction over the defendants.[2]

Section 600.711 grants general personal jurisdiction over a corporation if it carries on "a continuous and systematic part of its general business within the state." This section was intended to codify the minimum contacts requirement set down by the Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and other cases with the additional requirement that the minimum contacts be continuous and systematic in nature. *Donley v. Whirlpool Corp.*, 234 F. Supp. 869, 872 (E.D. Mich. 1963). *Kircos v. Lola Cars, Ltd.*, 97 Mich. App. 379, 384-85 (1980). *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, ____ U.S. ____, 104 S. Ct. 1868, 1872 (1984). This being the case, the Court need not reach the constitutional issue. In order to find that §600.711 authorizes the exercise of jurisdiction, the Court must find that defen-

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[2] Plaintiff asserts that the jurisdictional statutes regarding partnership associations and unincorporated voluntary associations govern the exercise of jurisdiction over the Association. M.C.L.A. 600.731 and 600.735. Since the Association is an incorporated Illinois not-for-profit corporation, the Court must apply section 600.711.

dants carried on a continuous and systematic part of their business in Michigan, and this would constitute sufficient contacts to satisfy due process. *Perkins v. Benquet Mining Co.*, 342 U.S. 437 (1952). *See also Helicopteros*, ____ U.S. ____, 104 S. Ct. at 1872-73.

Perkins and *Helicopteros* are instructive. In *Perkins*, the Ohio state court exercised general personal jurisdiction over the nonresident defendant Philippine mining corporation. During the Japanese occupation of the Philippine Islands, defendant's president and general manager opened an office in Ohio from which he conducted the corporation's business meetings, maintained active bank accounts and formulated corporate policy. Defendant, through its president, conducted a continuous and systematic portion of its business in Ohio. The Supreme Court held that the exercise of general jurisdiction over defendant was "reasonable and just." 342 U.S. at 438.

In contrast, the Supreme Court in *Helicopteros* held that the defendant Columbian corporation did not have sufficient contacts with Texas for the exercise of general personal jurisdiction. Even though Helicopteros purchased 80% of its helicopters from a Texas corporation, sent pilots, maintenance and management personnel to Texas for training, conducted contract negotiations in Texas with decedents' employer and received payments drawn on a Texas bank, the Court concluded that these contacts did not constitute the kind of continuous and systematic general business contacts which would satisfy the due process clause requirements for the exercise of personal jurisdiction. 104 S. Ct. at 1873-74.

In the present case, it is undisputed that defendants do not maintain a place of business in Michigan or are licensed to do business in the state. Defendants also do not have an agent or employee authorized to do business in Michigan. The Board's contacts with Michigan consist of sending plaintiff an application pursuant to her request and follow-up correspondence. The Board's activities cannot be "described or regarded as a contact of a 'continuous and systematic nature.' " *Helicopteros*, 104 S. Ct. at 1873.

Hanson v. Denckla, 357 U.S. 235, 253 (1958) (nonresident defendant must purposefully avail itself of the privilege of conducting activities within forum state; unilateral activity of plaintiff cannot satisfy the requirement of defendant initiating contact with the state). The Association's contacts with Michigan include the solicitation of new members, collecting dues and sending correspondence and publications to its members as an incident of paying dues. The Association's contacts with Michigan are not so pervasive that it could be sued in this forum on any cause of action. The Association does not solicit dues in order to reap a profit in the commercial sense, but rather to recoup the expenses of serving its members. Its activities do not rise to the same level of continuous and systematic conduct of business as those in *Perkins. Rocke v. Canadian Auto Sport Club*, 660 F.2d 395, 397-99 (9th Cir. 1981) (direct solicitation of drivers for race in Canada in which plaintiff was injured, advertisement and promotions for race, solicitation to participate in specific events and correspondence with drivers do not constitute "conducting business" in California); *Jones v. North American Aerodynamic, Inc.*, 594 F. Supp. 657, 663 (D. Me. 1984) (advertising and sale of parachuting equipment in Maine not sufficient contacts for general jurisdiction).

The Court, therefore, concludes that defendants' contacts with the State of Michigan are insufficient to constitute a "continuous and systematic" conduct of business within the State. The exercise of general personal jurisdiction over the defendants based upon their limited contacts with Michigan would be unreasonable and affront the traditional principles of due process. *International Show Co. v. Washington*, 326 U.S. 310, 319 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977). The defendants are not subject to general personal jurisdiction under M.C.L.A. §600.711(3).[3]

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[3] The mere fact that defendants consented to jurisdiction of this Court in 1974 has no bearing on their ability to assert the defense in this case. The 1974 suit arose directly out of the defendants' activities within the state. Plaintiff's claim in this matter is unrelated to defendants' activities in Michigan.

Defendants' motions to dismiss for lack of personal jurisdiction will be granted. An appropriate order will be entered.

RICHARD F. SUHRHEINRICH
United States District Judge

Dated: July 9, 1985

[Dated July 9, 1985]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 84-5069
Hon. Richard F. Suhrheinrich

JOAN ELENA LANIER,

Plaintiff,

v.

THE AMERICAN BOARD OF ENDODONTICS,
a corporation,

Defendant.

Civil Action No. 84-5398
Hon. Richard F. Suhrheinrich

JOAN ELENA LANIER,

Plaintiff,

v.

THE AMERICAN ASSOCIATION OF ENDODONTISTS,
and THE AMERICAN BOARD OF ENDODONTICS,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION
TO REMAND AND GRANTING
DEFENDANTS' MOTIONS TO DISMISS

In accordance with the Memorandum Opinion bearing this date,

IT IS HEREBY ORDERED that plaintiff's motion to remand Civil No. 84-5069 is DENIED.

IT IS FURTHER ORDERED that defendants' motions to dismiss for lack of personal jurisdiction are GRANTED.

RICHARD F. SUHRHEINRICH
United States District Judge

DATED: July 9, 1985

APPENDIX D

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.